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TRANSCRIPT OF RECORD

Proceedings in the District Court of the United States for the Western District of Kentucky, at a regular term begun and held in Paducah on the 16th day of April, 1951.

Present: Honorable Roy M. Shelbourne, Judge, United States District Court for the Western District of Kentucky.

The Illinois Central Railroad Company, Inc., - Plaintiff,

vs. Paducah No. 557.

Brandeis Machinery & Supply Company, Inc.,
S. G. Olberding, d/b/a Vess Transfer Company,
Charles Darnell, - - - - - - - Defendants.

Be It Remembered, that heretofore, to-wit, on the 10th day of May, 1951, came the Plaintiff by its counsel and tendered its Complaint in the above styled action, which Complaint was filed in the office of the Clerk of this Court and which is in words and figures as follows:

COMPLAINT—Filed May 10, 1951.

I.

The plaintiff, the Illinois Central Railroad Company, Inc., states that it is a corporation created and existing under the laws of the State of Illinois with authority to engage in the operation of a railroad in interstate commerce and qualified to and is engaged in the operation of a railroad through various counties of the State of Kentucky

including McCracken County and it is a non-resident of the State of Kentucky.

The defendant, Brandeis Machinery & Supply Company, is a corporation created and existing under the laws of the State of Kentucky and engaged in business in McCracken County, Kentucky. The defendant, S. G. Olberding, is a resident of 321 North Kerth Street, City of Evansville, in the State of Indiana, and is engaged in a transfer and trucking business under the firm name and style of "Vess Transfer Company." The defendant, Charles Darnell, is a resident of 315 Cass Avenue, City of Evansville, in the State of Indiana.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars, as hereinafter set out.

II.

For its cause of action herein the plaintiff states that on April 26, 1951, the defendants, by and through their agent, servant and employee the defendant, Charles Darnell, operated a motor vehicle, to-wit, a tractor and flat bed trailer upon which there was loaded a Lucyrus-Erie TD-9 dozer shovel on Kentucky Highway No. 305 in McCracken County, Kentucky, in such a careless and negligent manner as to cause same to run into and strike the railroad bridge of this plaintiff known as J.F.-0-9 located approximately one mile south of Chiles, McCracken County, Kentucky, thereby knocking said bridge and railroad tracks located thereon out of line. Shortly after the striking of said bridge as aforesaid this plaintiff's train consisting of engine No. 6029 and ninety-five (95) cars, sixty-seven (67) of which cars were loaded and twenty-eight (28) of which were empty, in attempting to pass over said bridge was caused to be derailed by the act of the defendants as aforesaid in striking said bridge to the loss and damage of this plaintiff in the sum of One Hundred Fifty Thousand ($150,000.00) Dollars.

Plaintiff further states that all loss and damage herein complained about was and is the direct approximate result

of the negligence and carelessness of these defendants in the operation of the said tractor and trailer as aforesaid.

Wherefore, plaintiff prays judgment against the defendants in the sum and amount of One Hundred Fifty Thousand ($150,000.00) Dollars together with interest thereon from April 26, 1951, and that summonses be awarded against said defendants, summonses for the defendants S. G. Olberding and Charles Darnell to be directed to the United States Marshal for the Eastern District of Kentucky to be served on the Honorable George Glenn Hatcher, Secretary of State, Commonwealth of Kentucky, Frankfort, Kentucky, pursuant to Chapter 188, Kentucky Revised Statutes, Sections 020 and 030 and it prays for its costs herein expended and for all other relief to which it may appear entitled.

Wheeler and Marshall,
By Thos. J. Marshall, Jr.,
Paducah, Kentucky,
Attorneys for Illinois Central
Railroad Company.

SEPARATE AND SEVERAL MOTION OF DEFENDANTS, S. G. OLBERDING, d/b/a VERA TRANSFER COMPANY, AND CHARLES DARNELL, TO QUASH PROCESS AND DISMISS THE ACTION—Filed May 29, 1951.

Come now the defendants, S. G. Olberding, d/b/a Vera Transfer Company, and Charles Darnell, and enter their special appearance herein by and through William L. Mitchell and Charles G. Franklin, their attorneys, for the purpose of this motion and for no other purpose, and respectfully move this Court as follows:

1. That each one of these moving defendants is a resident of the State of Indiana, and reside in the City of Evansville, said state, which is in the Southern District of

Indiana, Evansville Division of the District Court of the United States for that state, and that neither one of these moving defendants were residents of the State of Kentucky at the time this action was commenced or prior to said time, and are not now residents of said State of Kentucky, or of the Division of the Federal District Court therein where this action was commenced.

2. That neither one of these moving defendants waives his rights under and pursuant to the law of the United States to be sued in the District Court of his residence, and insists upon his said right, and on the application of the laws of the United States in respect to venue to this proceeding, and now they each respectfully move this Court for an order dismissing this action as to them, and to each of them, and respectfully show and assert that the complaint of the plaintiff herein discloses that said plaintiff, Illinois Central Railroad Company, Inc., is a corporation created and existing under the laws of the State of Illinois, whereof it is an inhabitant and resident, and that it is a non-resident of the State of Kentucky while said complaint also shows and discloses that these moving defendants each reside in the City of Evansville, State of Indiana.

3. These moving defendants, separately and severally as to each one thereof, and under their special and limited appearance herein, further respectfully move the Court to dismiss this action as to each one and both of said defendants, for the reason and on the ground that no valid service was effected on either thereof, service of process having been caused to be made in this proceeding at the instance of the plaintiff, under and pursuant to Sec. 183.020, and succeeding sections, which provide for service of process in courts of the State of Kentucky against non-resident defendants, which statutes are further designated as Kentucky Revised Statutes, and which sections of statute have no extra territorial force or effect, nor do they apply to the Federal Courts, nor can they serve to confer jurisdiction on Federal Courts which are a dependency on Federal Statutes in respect to jurisdiction and in respect to the service of process in an action originally filed in the Federal Court.

Separate and Several Motion of Defendants, Etc.

That not only do the said statutes of Kentucky apply within the territorial limits of that state to courts within the state, but the civil process of this court in this case is not authorized beyond the district in which the action was commenced, to-wit: the Western District of Kentucky, Paducah Division.

That neither one of these moving defendants have waived the personal privilege which inures to the benefit of them, and each of them, but raise and present their objections to the jurisdiction of this Court over their persons at the first and earliest opportunity, and as the first step in this proceeding, under their special and limited appearance as aforesaid, and respectfully move the dismissal of this action as to them and to each of them.

4. These moving defendants, separately and severally as to each one thereof, and under their limited and special appearance as aforesaid, further respectfully move the Court that the process herein as attempted or made on each one of these moving defendants be quashed, and set aside, and held of no force or effect, for the reason or reasons and on the ground or grounds that the Federal practice and procedure do not entertain nor provide for service in the manner here made, to-wit: Under a statute of the State of Kentucky which provides that any non-resident operator or owner of any motor vehicle who accepts the privilege extended by the laws of the State of Kentucky to non-residents to operate motor vehicles, or have them operated within said state, shall, by such acceptance and by the operation of such motor vehicle within said state, make the Secretary of State thereof his agent for the service of process in any civil action instituted in the courts of such state against such operator or owner arising out of or by reason of any accident or collision or damage occurring within such state and in which the motor vehicle is involved, said statute having no extra territorial force or effect, and having no effect whatsoever on the jurisdiction of the Federal Court or the service of process in an action commenced originally in that court.

Further, for the reason that such a statute can have no force or effect in extending, in favor of the Federal Court,

the power to cause process to be issued and served outside of its district, the Federal Court being a dependency on the Federal Statutes and Federal rules of practice and procedure, and the Federal Judicial Code, for its jurisdiction and for proceedings thereunder.

Further, for the reason that service so attempted or made does not have the effect or force of bringing these moving defendants within the jurisdiction of this Court over their timely objection, and over their timely special and limited appearances under which these objections and motion to dismiss are made.

Further, the service so attempted to be made on these moving defendants, and on each thereof, and so made first, by service on the Secretary of State of Kentucky in another district to said state, to-wit, The Eastern District of Kentucky, than the one wherein this action was filed, and then, second, through the said Secretary of State by registered mail delivered to these moving defendants on the 16th day of May, 1951, in the City of Evansville, Indiana, wherein they have at all times resided, they each, then and at all times herein mentioned, being without the jurisdiction of this Court.

5. Further, that the ground or basis for the invocation of the Federal jurisdiction in this case or proceeding, is diversity of citizenship, that is to say, solely on the ground of diversity of citizenship, coupled with a demand for an amount beyond the jurisdictional requirement in respect to dollars and cents, and these moving defendants may neither be joined in an action in the Western District of Kentucky nor may they be served outside the district and state in the manner here attempted.

6. These moving defendants support this, their motion, by the affidavit of one of their attorneys, hereinafter appearing, and by the affidavit of S. G. Olberding, which is filed and submitted herewith.

Wm. L. Mitchell,
Chas. G. Franklin,
Attorneys for Defendants, S. G. Olberding, d/b/a Vess Transfer Company and Charles Darnell.

Certification

State of Indiana, Vanderburgh County. } ss.

William L. Mitchell, being first duly sworn upon his oath says that he is one of the attorneys for the defendants, S. G. Olberding, d/b/a Voss Transfer Company and Charles Darnell in the above entitled cause, and that he is duly authorized to and does hereby make this affidavit for and in the behalf of said defendants.

Affiant further says that the matters and facts set forth in the above and foregoing motion of said moving defendants are true in substance and in fact as he is informed and verily believes.

Dated and signed at Evansville, Indiana, this 26th day of May, 1951.

Wm. L. Mitchell.

Subscribed and sworn to before the undersigned Notary Public in and for said county and state this 26th day of May, 1951.

Cora G. Huber,
Notary Public.

My commission expires, December 27, 1951.
(Seal)

SUPPORTING AFFIDAVIT—Filed May 29, 1951.

Sylvester G. Olberding, being first duly sworn, deposes and says:

1. That he is a party defendant in the captioned matter and is a co-defendant of Charles Darnell, with whom he has filed his separate and several motion to dismiss this action as to him and his said co-defendant, and to quash and set aside the process and the service thereof as attempted or made in this action.

2. Affiant says that he is a resident of the City of Evansville, Vanderburg County, State of Indiana, now and

that he has been such resident at all times prior to and following the filing of this action against him and his said co-defendant in this court, and that his residence is number 1151 East Walnut Street, in the City of Evansville, said county and state.

3. That his co-defendant, Charles Darnell, now resides, and has resided at all times since the commencement of this action and prior thereto, at 315 Cass Avenue in the City of Evansville, Vanderburgh County, Indiana.

4. That neither this affiant nor his said co-defendant resided in the State of Kentucky, or in the Western District of said state or any where excepting as set out hereinabove, at any time since the commencement of this action, or now or for some years prior to the commencement of said action.

5. That the only service made upon them, or either of them, in this action, was by registered mail, delivered to this affiant and to his said co-defendant by and through that medium, that is to say, through and by means of registered mail, in the City of Evansville, Vanderburgh County, Indiana, wherein they reside and have so resided at all the times herein stated.

6. That this action should be dismissed as to affiant and his said co-defendant, and the process herein set aside and quashed, and the service thereof set aside and quashed, on and by reason of the facts herein stated.

Sylvester G. Olberding.

Subscribed and sworn to before me, the undersigned, a Notary Public in and for Vanderburgh County, State of Indiana, this 26th day of May, 1951.

Cora G. Huber,
Notary Public.

(Seal)

My commission expires December 27, 1953.

MOTION OF ILLINOIS CENTRAL RAILROAD COMPANY—Filed July 17, 1951.

The Illinois Central Railroad Company moves the Court that so much of this action as seeks a recovery against the defendant Brandeis Machinery and Supply Company be dismissed and on this motion prays an order of the Court.

Thos. J. Marshall, Jr.,
Attorney for Illinois Central
Railroad Company,
c/o Wheeler & Marshall,
Paducah, Kentucky.

ORDER AND JUDGMENT—Entered July 17, 1951.

The motion of the plaintiff Illinois Central Railroad Company to dismiss so much of the above styled action as seeks a recovery against the defendant Brandeis Ma- dismissed and on this motion prays an order of the Court. the Court being sufficiently advised,

It is ordered and adjudged that said motion be and the same is hereby sustained.

This 17th day of July, 1951.

Roy M. Shelbourne,
Judge, United States District Court.

ORDER—Entered August 15, 1951.

The motion of the defendant S. G. Olberding, d/b/a Vess Transfer Company and Charles Darnell to quash the process herein and to dismiss said action on the grounds of improper venue coming on to be heard, said matter having been argued orally before the Court and memoranda having been filed herein, the Court having considered said matter and being sufficiently advised,

It is ordered and adjudged that each of said motions be and the same is hereby overruled.

This 15th day of August, 1951.

Roy M. Shelbourne,
Judge, United States District Court.

ANSWER OF INDIVIDUAL DEFENDANTS—
Filed August 29, 1951.

FIRST DEFENSE.

Come now the individual defendants, S. G. Olberding, doing business as Vess Transfer Company, and Charles Darnell, under their special and limited appearance herein, and for their joint and several First Defense to plaintiff's complaint herein, respectfully say:

1. That the plaintiff, Illinois Central Railroad Company, Inc., is a citizen of the State of Illinois and that the said individual defendants herein are residents and citizens of the State of Indiana.

2. That neither the said plaintiff nor the said individual defendants herein are now or have been since the filing of the action herein or at any other time as complained of in plaintiff's complaint herein, either citizens or residents of the State of Kentucky or the Western District of Kentucky, Paducah Division thereof.

3. That the sole remaining defendant herein, the Brandeis Machinery and Supply Company, Inc., is a cor-

poration organized under the laws of the State of Kentucky with its office and principal place of business in the city of Louisville, Kentucky, and is a citizen of the State of Kentucky.

4. That jurisdiction in the civil action herein is founded only on diversity of citizenship and may be brought only in the judicial district where all the defendants are residents or where the plaintiff resides or may be by some provision of law amenable to the jurisdiction of this Honorable Court.

5. That the individual defendants herein respectfully show the court that as individual defendants in the civil action for personal judgment they may be sued only in the United States District Court for the Southern District of Indiana, Evansville Division, and may not be sued where "found" actually or constructively in this or any other Federal jurisdiction.

6. That neither of said individual defendants has waived or does now waive his right to be sued in the district of his residence and has not consented to be sued and does not now consent to be sued in the United States District Court for the Western District of Kentucky and each of said defendants has at all times asserted and does now assert his right as a citizen of Indiana to personal service in an action for personal judgment as by law provided, and has not consented to and does not now consent to accept service made upon the Secretary of State of the State of Kentucky or upon any other officer or person.

7. Each of said defendants admits he may be sued in any State Court within whose jurisdiction he may be found, actually or constructively, but claims the protection of the Federal Act fixing and determining his right to be sued only in the district of his residence, and further denies he may by a statute of the State of Kentucky be deprived of a right granted him by a statute of the United States, to be sued only in his own district or that of plaintiff.

8. That venue as against each individual defendant has been and now is limited to the District of the residence of plaintiff or defendant and may not and does not depend on correlative or concurrent jurisdiction in State Courts.

9. That the suit herein for personal judgment against individuals is differentiated by statutory enactment from local actions and actions in rem, and may not be confused therewith nor conformed to the practice therein.

10. That the venue of an action against a corporation defendant is affected by its voluntarily consenting to be sued in any state where it is doing business and agreeing as a matter of a contract with the State to accept service upon a named party as notice to itself in any action against such corporation.

Each individual defendant respectfully shows the Court he has not filed any such consent, nor received any such grant of authority to do business, or named or agreed to name any such process agent, in this or any other action.

11. That the single and sole test of the waiver of venue in actions against corporate defendants, the voluntary act of appointing a process agent and consenting to be sued in Courts of the state and establishing a place of business in the state, is wholly absent in the instant proceeding in the case of each individual defendant and the cause should in all things be dismissed for want of jurisdiction over the person of the individual defendants and each of them and of the cause of action as to them in the particular suit herein should be held and adjudged without the jurisdiction of this Honorable Court.

Wherefore, the individual defendants, S. G. Olberding, d/b/a Vess Transfer Company, and Charles Darnell, separately and severally pray the Court for an order dismissing the action as to them and each of them and quashing the Notice of the Secretary of State for the State of Kentucky as to these individual defendants and each of them.

Wm. L. Mitchell,
W. C. Melborn,
Milford M. Miller,
Charles G. Franklin,
Attorneys for Individual Defendants,
S. G. Olberding, d/b/a Vess Transfer Company, and Charles Darnell.

Answer of Individual Defendants

SECOND DEFENSE.

The joint and several Second Defense of the individual defendants, S. G. Olberding, doing business as Vess Transfer Company, and Charles Darnell, to the complaint of the plaintiff above named, respectfully shows that the complaint fails to state a claim against said defendants or either of them upon which relief can be granted.

THIRD DEFENSE.

The individual defendants, S. G. Olberding, doing business as Vess Transfer Company, and Charles Darnell, separately and severally admit the allegations contained in Paragraph One of plaintiff's complaint herein and said defendants each separately and severally deny each and every other allegation contained in the plaintiff's complaint herein.

Wherefore, the individual defendants and each of them, separately and severally pray the court for judgment that the complaint of plaintiff be dismissed with costs to the plaintiff.

Dated August 29, 1951.

Wm. L. Mitchell,
W. C. Melborn,
Milford M. Miller,
Charles G. Franklin,
Attorneys for Individual Defendants,
S. G. Olberding, d/b/a Vess Transfer Company, and Charles Darnell.

MOTION TO STRIKE FROM THE ANSWER—
Filed September 17, 1951.

The plaintiff, Illinois Central Railroad Company, moves to strike from the answer of S. G. Olberding and Charles Darnell numbered paragraphs two through eleven inclusive contained in the first defense of said answer and for reasons for said motion it states that all matters contained in said numbered paragraphs two through eleven in the first defense are a reiteration of said defendants' motion to dismiss this action and to quash the service of process herein, all of which have been ruled on by this Court adversely to the contentions of said defendants; and that same does not constitute a defense to plaintiff's cause of action against said defendants and upon this motion the plaintiff prays the judgment of the Court.

Thos. J. Marshall, Jr.,
c/o Wheeler & Marshall,
Paducah, Kentucky,
Attorneys for Illinois Central
Railroad Company.

I hereby certify that I have this day mailed a copy of the foregoing motion to the Hon. William Mitchell and the Hon. Charles Franklin, Attorneys for the defendants. This 17th day of September, 1951.

Thos. J. Marshall, Jr.,

MOTION FOR LEAVE TO FILE—Filed September 29, 1951.

The individual defendants, Charles Darnell, and S. G. Olberding, doing business as Vess Transfer Company, respectfully move the Court for leave to file the attached Fourth Paragraph of Defense in the above entitled cause.

Wm. L. Mitchell,
Charles G. Franklin,
Welborn & Miller,
Attorneys for Individual Defendants,
Charles Darnell and S. G. Olberding d/b/a Vess Transfer Company.

ANSWER OF INDIVIDUAL DEFENDANTS—Tendered September 29, 1951; filed October 18, 1951.

FOURTH DEFENSE.

The individual defendants, Charles Darnell, and S. G. Olberding doing business as Vess Transfer Company, separately and severally as to each thereof for their further and fourth defense herein, allege and say:

1. That the defendants and each of them used due care and diligence in the operation of their motor vehicle to-wit: The tractor and flat-bed trailer upon which was loaded the Bucyrus-Erie Bulldozer shovel on Kentucky Highway number 305 in McCracken County, Kentucky, on April 26, 1951.

2. And, said defendants and each of them allege that the damage complained of in plaintiff's complaint, if any, was not caused by any negligence on the part of the said defendants or either of them but was owing to and resulted from the negligence and fault of the plaintiff, Illinois Central Railroad Company, Inc., itself, its agents and employees.

Wm. L. Mitchell,
Charles G. Franklin,
Welborn & Miller,
Attorneys for Individual Defendants,
Charles Darnell and S. G. Olberding d/b/a Vess Transfer Co.

OBJECTION TO FOURTH DEFENSE—Filed October 10, 1951.

The plaintiff, Illinois Central Railroad Company, objects to the filing of the so-called Fourth Defense of the defendants, S. G. Olberding and Charles Darnell for the reason that said Fourth Defense contains no matter of defense to plaintiff's complaint and on this it prays the judgment of the court.

Thos. J. Marshall, Jr.,
s/o Wheeler & Marshall,
Citizens Savings Bank Bldg.,
Paducah, Kentucky.

I hereby certify that I did on the 9th day of October, 1951, mail copy of the within motion to William A. Mitchell, Welborn and Mitchell, and to Hon. Charles Franklin, Attorneys for the defendants.

Thos. J. Marshall, Jr.,

MOTION OF CHARLES DARNELL TO DISMISS THE ACTION FOR NON-JOINDER OF INDISPENSABLE PARTY AND WANT OF JURISDICTION OF THE ACTION—Filed October 11, 1951.

The defendant, Charles Darnell, moves the Court for an order to dismiss the action herein because:

1. There is non-joinder of an indispensable party defendant and,

2. Neither plaintiff nor defendant reside within the jurisdiction of the United States District Court for the Western District of Kentucky.

In support and for ground of assignment No. 1, defendant respectfully shows the Court:

(a) The complaint alleges negligence in the operation of a tractor and flat bed trailer upon which was

hauled a Bucyrus-Erie 22-B Dragline shovel on Kentucky highway No. 305 in McCracken County, Kentucky.

(b) In transporting the said machinery and equipment from the city of Louisville to the city of Paducah, both in the state of Kentucky, defendant was under the orders and direction and operated as the agent and employee of the defendant, S. G. Gheading.

That beyond said city of Paducah the said Reynolds Machinery & Supply Company, Inc. solely and alone ordered and directed the defendant in the transporting of the said machinery and equipment of the Reynolds Machinery & Supply Company, Inc. from the city of Paducah to a point on the Ohio River, approximately fifteen miles west of the said city, over the said highway No. 305.

(c) That upon arrival in the City of Paducah, on the 28th day of April, 1951, the defendant contacted the managers of the said Reynolds Machinery and Supply Company, Inc. for instructions as to where in Paducah he was to unload the said machinery and equipment of the said company, and was directed and instructed by the said company to haul the said highway No. 305 to a point some fourteen (14) or fifteen (15) miles west of Paducah, and near the bank of the Ohio River.

(d) That said company and its agents and employees were familiar with said highway and the hazards, if any, of transporting the said machinery and equipment over and upon said highway No. 305, and the defendant was not familiar therewith and relied upon the orders and direction of said company to transport said company's Bucyrus-Erie 22-B Dragline Shovel to a point beyond the original destination and to a sand and gravel company's plant near the Ohio River more than twelve miles west of the original destination at Paducah, Kentucky.

[redacted]

Wherefore, for such and all such reasons, this defendant prays the court to dismiss the action herein at the cost of the plaintiff and for all other proper relief.

William L. Mitchell
William C. Welborn
Milford M. Miller
Charles G. Franklin

Certification

State of Indiana
Vanderburgh County } ss:

Charles Darnell, being first duly sworn upon his oath, says that he is one of the defendants in the matter of Edith Darnell, Illinois Central Railroad Company, Inc., et al., No. [illegible], and that he makes this affidavit in support of the motion and plea of res judicata contained in the above and foregoing motion, and in this action by his attorneys in the matter.

Affiant further says that the motion and facts set forth in and by the said motion are true in substance and in fact as he is informed and fully believes.

Witness the signature of said Charles Darnell hereunto subscribed this 16th day of October, 1951.

Charles Darnell.

Subscribed and sworn to before me, the undersigned, a Notary Public in and for said county and state this 16th day of October, 1951.

Owen O. Bishop,
Notary Public.

My commission expires: December 27, 1952.
(Seal)

ORDER—Entered October 18, 1951.

The motion of the defendant, Charles Darnell, to dismiss the above styled action coming on to be heard, the Court being sufficiently advised,

It Is Ordered and Adjudged, that said motion be overruled.

This the 18th day of October, 1951.

Roy M. Shelbourne,
Judge, U. S. District Court.

[illegible]—Entered October 24, 1951.

[illegible] of the plaintiff to the filing of the Fourth [illegible] Complaint, [illegible] and Charles [illegible] Railway Company, [illegible] Chicago, Rock Island and Pacific Railway Co. [illegible] Fourth Amended Complaint as a plea [illegible]

[illegible] and motion by said [illegible]

[illegible] October, 1951.

Roy M. Shelbourne,
Judge, United States District Court.

[illegible]—Entered October 24, 1951.

[illegible] of the plaintiff, Illinois Central Railroad [illegible] Amended Complaint numbered 2 through 11, [illegible] Paragraph 2 of the Separate Answer of [illegible] Central Railroad Company as to be [illegible] separately stated.

[illegible] said motion be sustained and said [illegible] numbered 2 through 11, inclusive, of the First [illegible] and Answer stricken.

Entered October 24, 1951.

Roy M. Shelbourne,
Judge, U. S. District Court.

ORDER—Entered October 22, 1951.

It Is Hereby Ordered that this action be and the same is set for trial December 17, 1951.

R. M. Shelbourne,
Judge, U. S. District Court.

AMENDED COMPLAINT—Filed in Open Court, December 18, 1951, Over Objection of Defts.

With leave of Court, and in order to conform to the proof, plaintiff amends its complaint, and states:

III.

At the time and on the occasion referred to in the original complaint, eighteen (18) cars, which were a part of said train of ninety-five (95) cars, owned by other common carriers by railroad, were derailed and damaged or destroyed, as the direct and proximate result of the negligent building of said bridge by the defendants, as alleged in the original complaint. Said eighteen (18) cars owned by other railroads were a part of plaintiff's train referred to in the complaint. Pursuant to the practice and custom of such common carriers by railroad in the United States, complainant was required to and did incur expense of repair work done by it, or by the owners, on such cars as could be repaired, and became liable to and paid to the owners of such cars as were destroyed, the value thereof. The plaintiff was required to and did pay to the owners of said cars, on account of the value of cars destroyed, and repair of cars which could be repaired, a total sum of $41,310.52. The amount of damages in the sum of $41,310.52 for damage to and destruction of cars owned by other carriers directly and proximately resulting from the negligence of the defendants, as alleged in the original complaint. The loss and damage to cars owned by other carriers and derailed at the time and place mentioned in the complaint was not less than $41,310.52.

IV.

It states that at the time and on the occasion referred to in the complaint, that eighteen (18) of the twenty-three (23) cars which were derailed, were loaded with goods and merchandise shipped by the owners thereof, and in the hands of this plaintiff as a common carrier. It states that it was liable to the owners of the goods and merchandise in said eighteen (18) cars for loss, damage and injury to such goods and merchandise. Subject to certain exceptions not applicable herein, it was liable as an insurer to the owners of the contents of said derailed cars. Such freight, lading and contents were damaged, lost and destroyed, as the direct and proximate result of the negligence of the defendants referred to in the orginal complaint, and as a direct and proximate result of said negligence plaintiff became liable to the owners of said goods and merchandise, and paid to said owners the amount of lawful claims made by them, amounting to a total of $43,501.51. In addition to the above amount, which it was required to pay, and has paid, to the said owners of the goods, lading and contents of said cars, it is liable to and will be required to pay on account of additional loss of lading or contents of said cars, the sum of $2,690.00, making a total of $46,191.51, loss which it has incurred on account of loss and damage to the contents of said cars.

V.

All of the allegations of its original complaint are adopted and made a part of this amended complaint. The items of loss herein set out were a part of the total loss and damage prayed for in Paragraph II of its original complaint.

Wherefore, plaintiff prays for judgment against the defendants in the following sums and amounts:

1. For damages on account of damage to and loss of cars of other common carriers, $41,310.52;

2. For damage on account of loss of and damage to shipments in said derailed cars, $46,191.51;

Amended Complaint

3. For damage to property of the plaintiff and expense incurred by it on account of said wreck and derailment, $62,497.97.

And it prays as in its original complaint.

James G. Wheeler,
Thos. J. Marshall, Jr.,
c/o Wheeler & Marshall,
901-5 Citizens Savings Bank Bldg.,
Paducah, Kentucky,
Attorneys for Plaintiff.

Filed December 14, 1951; Read into record on Dec. 18, 1951

DEPOSITION ON BEHALF OF PLAINTIFF—Filed December 14, 1951. Read into record on Dec. 18, 1951, in trial of this case.

APPEARANCES:

For the Plaintiff:

Thomas J. Marshall, Jr.,
Wheeler & Marshall, Paducah, Ky.

For the Defendants:

William L. Mitchell,
W. C. Welborn, Evansville, Ind.

The deposition of Charles Darnell, one of the defendants in the above styled action, taken on behalf of the plaintiff, on October 16, 1951, at 2 P. M., at the law offices of Wheeler & Marshall, 901 Citizens Savings Bank Building, Paducah, Kentucky, said deposition being given by the witness pursuant to order of this Court, the time and place of taking having been agreed upon by counsel for plaintiff and defendants.

Testimony of Charles Darnell

The deposition is taken for the purpose of discovery, or for use as evidence, or for both purposes, in the above styled action.

The reading of the deposition to the witness and his signature to said deposition is by the witness waived.

CHARLES DARNELL, being duly sworn, deposes as follows:

By Mr. Thomas J. Marshall, Jr.:

1. Your name is Charles Darnell?
A. Yes.
2. Where do you live?
A. 315 Cass Avenue, Evansville, Indiana.
3. How long have you lived in Evansville?
A. I have lived there since I was six years old, and I am fifty-four.
4. Are you employed?
A. Yes.
5. By whom?
A. Vess Transfer Company.
6. How long have you been so employed?
A. I have been there between four and five years this last time.
7. Has that been continuous employment for the past four or five years?
A. Yes.
8. What type of work do you do?
A. I drive a truck.
9. Is that exclusively your job?
A. Yes.
10. Where do you drive?
A. I drive in the City and out of the City.
11. Wherever you are sent?
A. Yes.
12. Were you in McCracken County, Kentucky, on April 26, 1951, that is the County you are now in?
A. Yes.

By Mr. Welborn: May we show at this time that the defendants object to the further questioning of the witness

and to his answers being at this time taken, because it is in pursuance of an order in the pending cause in which the Court is without jurisdiction of the parties, and for that reason we think it is improper for the examination of the defendant to be pursuant. I just want the objection entered.

13. What were you doing in McCracken County on that date?

A. Driving a truck.

14. For whom?

A. For Vess Transfer Company.

15. Who is the proprietor or the owner of the Vess Transfer Company?

A. Sylvester Olberding.

16. What did you have on that truck?

A. I had a caterpillar tractor.

17. Where did you load it?

A. At Louisville, Kentucky.

18. On what date?

A. I loaded it that same day; I don't recall the date.

19. You later collided with a railroad underpass did you not?

A. I did, at Paducah—out of Paducah.

20. In McCracken County?

A. Yes.

21. You loaded the caterpillar you refer to on the same day you had the collision with the underpass referred to?

A. Yes.

22. At what point in Louisville did you load it?

A. At Brandeis' place in Louisville; I don't know where it is located.

23. In their yard or place of business?

A. Yes.

24. Who directed you to go to Louisville?

A. My foreman, Mr. Olberding.

25. Was anybody with you from Louisville to Paducah?

A. No.

26. Where were you directed to take this load?

A. To Paducah, Kentucky.

27. Who directed you to do that?

A. My boss, Mr. Olberding.

28. Where, in Paducah, were you directed to take it?

A. To Smiley Sand & Gravel Company at Paducah.

29. About what time did you arrive in Paducah?

A. I arrived here around four o'clock in the afternoon.

30. What did you do after you got here?

A. I drove around over on the river and inquired at all those sand and gravel companies where the Smiley Sand & Gravel Company was.

31. Did you at any time get in touch with anybody connected with Brandeis' office in Paducah?

A. Yes.

32. Whom did you talk with?

A. Mr. Ball.

33. Was that in the day time or night?

A. Late in the evening, just getting dusk.

34. Did you have a conversation with Mr. Ball?

A. Yes.

35. What was the nature of the conversation?

A. Mr. Ball told me to take that caterpillar—I asked him where Smiley Sand & Gravel Company was and he said it was way down below Paducah, and he said to take 358 until you get out to about five miles, and you come to a grocery on the right hand side, and then he said to turn right there at the grocery and go on out to where the road comes to a dead end and turn to the right and go on in to the Smiley Sand and Gravel Company.

36. Did you do that?

A. I went as far as the underpass.

37. What happened there?

A. Well the road was so rough I was down in second gear to drive around there and I had turned a bend and just as I got to it, I was driving slow, about that much of it bumped the top, and it stopped right then, and I got my truck out of gear and got out and looked and seen about that much of it—

38. How much is that?

A. About an inch and a half.

39. Of the top of the caterpillar?

A. The caterpillar prongs that stuck up.

40. Is it a front loading shovel affair?

A. Yes.

41. Two arms with a bucket on them?

A. Yes.

42. When they were raised did it cause the arms or the prongs to stick up?

A. Not the prongs. They are stationary.

43. They stay up all the time?

A. Yes.

44. Was that the portion of the load or caterpillar that struck the underpass?

A. Yes.

45. When you got out and looked where was your load with relation to the underpass?

A. The load was sitting on the flat bottom trailer and the two prongs were right against the bottom part of the iron.

46. The beam?

A. Yes.

47. Resting against it or under it?

A. Resting against it.

48. On the outside of it?

A. Yes.

49. Are you familiar with directions here?

A. No.

50. You were going from Paducah opposite from the direction you came into Paducah were you not?

A. Yes.

51. So if you had come into Paducah from the East you were travelling West?

52. The point where you struck this underpass would be on the East side of the underpass?

A. Yes, the East side of the underpass.

53. Did you come into Paducah on Route 60 from Louisville?

A. No, I came in on 41, into—I believe this side of Henderson, where it makes a "Y."

54. How did you go from Louisville?

A. I went back to Evansville.

55. That's down the Indiana side from Louisville to Evansville—through Indiana?

A. Yes.

56. Where did you get your instructions at the time you left Evansville to go to Louisville, or at the time you went back from Louisville to Evansville?

A. At the time I left from our office, Mr. Olberding told me to go to Louisville and pick up the caterpillar and bring it to Paducah.

57. Did you see him after you went back?

A. Yes, when I came back through Evansville, yes.

58. Why did you come back through Evansville?

A. It was a better road, and I know it well enough and didn't know the road in Kentucky.

59. You came from Evansville to Henderson and on to Paducah on that highway?

A. Yes, I came under the viaduct out of Henderson.

60. And on through Morganfield, Sturgis, and Marion, and across the Cumberland and Tennessee Rivers?

A. Yes.

61. You say you got out after you struck the underpass and looked at it; what did you do?

A. I said "Well I can't get under here I know" and I got back in my truck and backed down to the corner and turned around, about a half a square down there.

62. Where did you go then?

A. I went back to Paducah at Brandeis Company.

63. Did you know where their place of business was?

A. Yes.

64. You had been there before?

A. Yes.

65. When?

A. I had been there a couple of times before, hauling stuff there.

66. From Louisville?

A. No, from Evansville.

67. How many trips had you made from Evansville to Paducah?

A. I believe two trips is all I made.

68. Prior to this one?

A. Yes.

69. Both trips had been for Brandeis, hauling machinery for Brandeis?

A. Yes.

70. On both those occasions had you gone to the Brandeis office or yard here in Paducah?

A. Yes.

71. What type of equipment were you driving?

A. I was driving a Chevrolet tractor with a flat bottom trailer.

72. Describe the trailer?

A. Well it is just an ordinary flat bottom trailer.

73. The same as one of these Cargo systems, with the sides and top off?

A. The sides and top are off but its not as high.

74. What size tires does it have?

A. I don't know.

75. What size wheels?

A. I don't know.

76. Is it a low-boy?

A. No.

77. It is higher than a low-boy?

A. Yes.

78. What was the length of this tractor and trailer?

A. I don't know.

79. Do you know the width of it?

A. No.

80. Do you know the height of the load?

A. No.

81. Do you have any idea of the height of that shovel?

A. No.

82. What time did you leave Louisville?

A. Well I couldn't tell you exactly.

83. Approximately?

A. I don't remember what time I got there or left there, because I just light out and go and never look at a clock, and I load up and come on away.

84. After you got back to Brandeis' yard after striking the underpass did you talk with anybody connected with Brandeis?

A. Yes.

85. Who?

A. Mr. Ball—no, I talked to his wife.

86. Where was he?

A. Mr. Ball's wife said he was in some conference somewhere with somebody.

87. You called the home?

A. Yes, and a little later I left a telephone number, and she said she would have somebody call me, and I believe somebody from Smiley Sand & Gravel Company told me to take it to Brandeis yard and unload it there and I taken it over there that night after I left from out there, and I stayed all night, until the next morning, and the Brandeis man came and took a bulldozer and shoved up some dirt and I backed against it and he got on the caterpiller and drove it around and parked it, and I went on back to Louisville.

88. What for?

A. To get another caterpillar and take it to Evansville.

89. For Brandeis?

A. Yes.

90. What did you tell Mrs. Ball, if anything?

A. I asked if Mr. Ball was there and she said he wasn't, that he was in conference somewhere, and I said "Well I can't get under the underpass and there is no way I can unload" and she says "Well you wait and I will have somebody call you."

91. Was anyone around that underpass either at the time you hit it or immediately after; did you have a conversation with anybody out there?

A. Yes, with two men about a half a square away from it where I backed up and turned around.

92. At a Country Church?

A. Yes, I believe it was.

93. Was your trailer uncoupled after you struck the underpass?

A. No.

94. You say you were in second gear at the time you struck it?

A. Yes.

96. Why?

A. On account of the roads.

96. What was wrong with the roads?

A. So rough.

97. Full of holes?

A. Yes, and I had to make them short turns, and when there is something or other like that you could turn over, and I drive carefully when I am loaded like that.

98. Was there anything but the shovel on there?

A. No.

99. It occupied the whole trailer?

A. No.

100. Was there room for another shovel on there?

A. No.

101. You never did get under the underpass with the shovel then?

A. No.

102. Do you have Kentucky operator's license?

A. No.

103. Does that truck you were operating have Kentucky license on it?

A. No, not that I know of.

104. Do you know a man named Mahan, employed by Mr. Olberding?

A. Yes.

105. Was he with you at the time of this accident?

A. No.

106. What is Mr. Mahan's employment?

A. He is office boy.

107. In Evansville?

A. Yes.

108. Did you have any type of bill of lading or shipping instructions with you relative to this shovel?

A. No.

109. Did you have a paper to be signed by Smiley Sand and Gravel Company or any representatives, on delivery?

A. No.

110. Did Brandeis pay you for hauling for Mr. Olberding, or did he pay Mr. Olberding direct?

A. I don't know, they didn't pay me.

111. About what time of the evening was it when you struck the underpass, when you got to that point?

A. It was dark enough that I had to have my lights on.

112. Did you see the underpass as you approached it?

A. Yes.

113. Do you know the height of that underpass?

A. I didn't at that time; there wasn't any sign of any kind there.

114. Have you measured it since you struck it?

A. No.

115. Have you been there when anybody measured it?

A. No.

116. Have you been told what the height was?

A. Eleven feet and six inches I believe.

117. Eleven feet and a half is your best recollection?

A. Yes.

118. Your load was about two inches higher than that?

A. I wouldn't say two inches—about an inch and ½ I judge.

119. What property do you own?

A. I don't own any.

120. You own no real estate?

A. No.

121. Do you own a car?

A. No; I'm just a poor boy.

122. You referred to this thing as a caterpillar—it was a Bucyrus bulldozer shovel was it not?

A. Yes, not what you call a bulldozer—just a regular shovel.

123. A front loading affair, operated from the front end?

A. Yes.

124. There was no scraper on it?

A. No, it didn't have any scraper.

By Mr. W. C. Welborn:

124. You say that someone told you about the height of the underpass since the accident?

A. Yes.

125. Did someone tell you or did you see a sign out there?

A. I seen a sign.

126. Did that sign say 11.4 inches?

By Mr. Marshall: The sign speaks for itself.

A. That was 11.4 inches—now I remember seeing it today. I didn't mean to say that someone told me. I meant to say seen it today.

127. There was no sign out there when you went out there before you there?

A. No.

128. There is one there now?

A. Yes.

129. This machinery you described—that was one and a half to two inches that hit this underpass?

A. Yes.

130. If that is 11.4 the underpass was less than 13 feet and six inches?

A. Yes. I came under the Henderson viaduct on 41 and cleared that good.

131. Do you remember the height of it?

A. No.

By Mr. Marshall:

132. Is it painted on it?

A. Yes.

133. You went out there today?

A. Yes.

134. You didn't look at that?

A. I didn't pay any attention to the sign.

State of Kentucky, }
County of McCracken. } ss.

I, Clarice Jacob, a Notary Public within and for the State of Kentucky at Large, do hereby certify that the foregoing deposition was taken by me at the time and place and for the purposes stated in the caption; that the witness

[illegible]

Certification

[illegible] that the foregoing [illegible] contains a true and complete transcript of my shorthand notes of the testimony so taken by me [illegible] and correctly [illegible] the caption.

My commission expires on the 16th day of February, 1965.

Witness my hand and official seal this the 27th day of October, 1964.

Charles Jacob,
Notary Public, State of Kentucky
at Large.

(Seal)

[illegible]

[illegible]—Filed February 8, 1965.

December 17, 18 and 19, 1963,
Paducah, Kentucky.

Court before:

Honorable Roy M. Shelbourne, United States District Judge for the Western District of Kentucky, with a jury.

APPEARANCES:

Mr. James G. Wheeler and Mr. Thomas J. Marshall, for the plaintiff;

Mr. W. L. Hilsbeth and Mr. W. C. Withers of Brownsville, Indiana, and Mr. Joseph Prothrow, for the defendants.

LOYCE THOMPSON was called as a witness by counsel for the plaintiff, and after having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Marshall.

Q. Your name is Loyce Thompson
A. Yes, sir.

Testimony of Loyce Thompson

Q. Are you the Mr. Thompson referred to by the Reverend Weaver and Mr. Turner?

A. Yes, sir.

Q. Where do you work, Mr. Thompson?

A. State Highway Garage.

Q. What is your work?

A. Work out in the Garage, 22nd Street.

Q. Were you present at the Palestine Church on the occasion when the underpass over the highway there was struck?

A. Yes, sir.

Q. What attracted your attention, if anything, to the fact it had been struck?

A. Well, I heard a crash. I thought it was a couple of gravel trucks crash together out there, lots of heavy trucks on the road that night. I looked out the window and I saw these signal lights on the truck of the underpass. I made the remark to Mr. Turner, "Somebody has hit the trouble over there."

Q. Did you go down there or did you go out of the church?

A. Yes, sir, I went out. I started down there and I saw the man get back in the truck, backed out from under the bridge and I walked down in front of the pavement and he backed out.

Q. Did you have any conversation with him?

A. I talked to him a little.

Q. What did he say to you?

A. Well, when he backed up there and got out of the truck, there was another man stopped there I didn't know, and he asked us if we heard him hit the bridge, and I said "Yes, I heard you." He said "Well I hit it a 'jimer,' it like to broke my neck." I said, "Yeah, it sounded pretty bad where I was."

Q. What type of truck was this? Describe the truck.

A. It was a tractor. I thought—I could be mistaken, I thought it was a Chevrolet tractor pulling a flat-bed trailer.

Q. What was on it?

A. There was a high-lift or a dozer, best I remember

had a pan on it.

Q. How was it fastened to the bed of the truck, you remember?

A. Yes, sir, I saw him looking at it, I think it was chained to the flat-bottom of the truck.

Q. Did this man tell you where he was going?

A. Yes, sir, he did.

Q. Where did he say?

A. He said he was trying to get down on the river to Smiley Sand and Gravel. I told him how he could go around and detour and stay out from the underpasses.

Q. Were you able to see whether or not the tractor or the load went under the bridge?

A. No, not from the house, I couldn't, not from the Church.

Q. Did he make any statement to you whether he went under or did he just say that he hit it?

A. He just said he hit it.

Cross-examination by Mr. Welborn.

Q. Mr. Thompson, how long have you been with the Highway Department?

A. Four years.

Q. You have been familiar with this particular trestle for four years?

A. Yes, sir.

Q. Where does that road lead to?

A. Well, it goes into the river—what we call the Old Ferry Landing, Ogden Landing.

Q. How close is it to the Atomic Energy Plant?

A. This railroad?

Q. No, the highway.

A. Well, it runs right down beside of it.

Q. And that is highway 305?

A. I think that is right.

Q. Is that a State highway?

A. Yes, sir.

Q. Were there any signs up at this trestle the night of the accident?

A. I couldn't say.

Testimony of Loyce Thompson

Q. Had there been signs up?
A. Yes.
Q. What clearance did they show?
A. I don't remember that.
Q. Had you been out there repeatedly before this time?
A. Yes, I go under that trestle every day.
Q. I am talking about before the accident.
A. I had been under it once that night, going to the church.
Q. But you hadn't observed any signs at that time?
A. I never paid any attention to it, I pass there so often.
Q. What were your duties on the road?
A. I don't work in the road, I work in the garage.
Q. But you did pass back and forth, did you live out there?
A. Yes, sir.
Q. Do you remember whether you observed the trestle at all that night after the truck hit it?
A. Yes, I took a flashlight and looked up there.
Q. What did you observe?
A. I saw two places up on this I-beam, right on the bottom flange where something had hit it and slipped up it a short ways, about that far (indicating).
Q. Had there been other accidents at that trestle before that night?
A. There had been several, years ago.
Q. At that time there was a truck that fastened under there, wasn't there?
A. I don't know whether he got fastened under there or not. He hit it but I don't know whether he got fastened under there or not.
Q. What did you observe this particular night about the condition of the stringers, were they out of place or in place?
A. I don't remember looking at the stringers. The track was knocked over out of line.
Q. Where did you look at the track?
A. About half way under the trestle, down South

where the trucks of this car were setting off the track.

Q. Where the trucks were sitting off. They were sitting off when you were under there right after this hit, were they?

A. I didn't look at it then. I looked at it after the train wreck.

Q. I am asking you if you didn't look at the stringers after this truck hit?

A. No.

Q. Didn't you state to Mr. Thompson that you climbed upon this machine and examined those stringers with flashlight?

Mr. Marshall: Object.

The Witness: No.

Q. Did you not at that time make a statement that the stringers were in place?

A. I didn't.

Q. That you observed no damage to them at all?

A. I didn't.

Q. Didn't you at that time make the statement that if there had been any damage you would have notified the dispatcher?

A. No, sir. I said if I had had any idea that the track had been knocked out of line, I would have notified the dispatcher.

Q. So you didn't see it was out of line until after the train went off?

A. No, I didn't.

Q. And then where was it out of line, what point?

A. At the South end of the trestle.

Q. As far as the middle of the trestle was concerned, you never saw it was out of line, did you?

A. I didn't look at it. I just looked up there with a flashlight. From underneath, I couldn't see it.

Q. Well, after the accident did happen, cars were standing on that track entirely across the trestle, weren't they?

A. Almost I believe. One car was right across the highway.

Q. What time was that you saw this car across the

highway?

A. Right after the train wreck.

Q. Wasn't it at the South end with one of the trucks derailed—that was at the South end, wasn't it?

A. Yes.

Q. And then beyond that, the cars extended clear across the trestle, didn't they?

A. They did, on the North end.

Q. That's what I am talking about. So, that any change in the alignment of the track was right there at the South end when you saw it?

A. That is all I looked at.

Q. And that was after this wreck occurred and the rails were torn off up further South, weren't they?

A. Yes, they were.

Mr. Welborn: That's all.

S. W. PETERS was called as a witness by counsel for the plaintiff, and after having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Marshall.

Q. Will you state your name, please.

A. S. W. Peters.

Q. Where do you live, Mr. Peters?

A. Evansville, Indiana.

Q. By whom are you employed?

A. Brandeis Machinery and Supply Company.

Q. In what capacity?

A. Office engineer.

Q. Do you know Mr. Olberding?

A. Yes.

Q. Did you or not on or about the 25th or 26th day of April, 1951, negotiate a contract with Mr. Olberding or his firm?

A. Yes.

Q. What was the nature of that contract?

A. To transport this crawler-tractor from Louisville to Paducah area, job site.

Q. To whom was this tractor consigned?

A. Smiley Sand & Gravel Company, I believe.

Q. Were any instructions given by you to the Vess Transfer Company relative to the delivery of the tractor?

A. Yes, I told him to pick the tractor up at Louisville, bring it to Paducah, contact our office here for instructions as to where to take the tractor.

Q. Do you have a representative in Paducah?

A. Yes.

Q. And an office here?

A. Yes.

Q. With whom was this contract negotiated, what individual?

A. I talked with Mr. Mahan in the office first, and I believe I later talked with Mr. Vess or Mr. Olberding.

Q. Describe this equipment he was to transport, had you ever seen it, or a similar type?

A. It is what is known as a front-end loader, crawler-tractor with loader mounted on the tractor, which digs and loads.

Q. Ditches and loads?

A. Excavates and loads.

Q. Did you say crawler-type?

A. That's right.

Q. What do you mean by that?

A. It is mounted on steel pads, which—

Q. Is it what we refer to as caterpillar type?

A. No.

Q. I understand that is a different make.

A. That is a competitive make, which was an International, crawler-tractor.

Q. I meant from the standpoint that it is self-propelled.

A. Same type.

Q. And is the method of movement practically—

A. Very similar.

Q. Referred to as a caterpillar tread.

A. That's right, caterpillar tread.

Q. Was this transportation—how was Mr. Olberding to be compensated for this transportation?

A. A contract price for the entire job.

Q. And that involved the movement of the machine from Louisville to the Smiley Sand & Gravel Company?

A. That's right.

Q. What date was it to be delivered?

A. I believe it was April 26th.

Mr. Marshall: You may ask him.

Cross-examination by Mr. Freeland.

Q. Your company was formerly a defendant to this suit, were they not?

A. I believe that's correct, I am not sure.

Q. As to them, the suit has been dismissed, has it not?

A. I think that's correct, I don't know for sure.

Mr. Marshall: Object.

By the Court: Overruled.

Q. Do you know why it was dismissed as to your company?

Mr. Marshall: Objection.

By the Court: Sustained.

Mr. Freeland: That's all.

ALLEN BALL was called as a witness by counsel for the plaintiff, and after having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Marshall.

Q. Will you state your name, please.

A. Allen Ball.

Q. Where do you live, Mr. Ball?

A. I live in Paducah.

Q. By whom are you employed?

A. Brandeis Machinery & Supply Company.

Q. Where?

A. As manager of the local branch here.

Q. In Paducah?

A. In Paducah.

Q. Did you on or about April 26, 1951, have any conversation with Mr. Darnell relative to the movement of a piece of equipment?

A. Yes.

Q. What type of conversation did you have, I mean was it a personal conversation or—

A. I had a telephone conversation with the gentleman who said he was Mr. Darnell, asking for directions to the Smiley job.

Q. Where were you when you were called?

A. Irvin Cobb Hotel.

Q. Do you recall about the time of day this was?

A. I had two conversations, the first about six-thirty, the best of my memory.

Q. Did you or not direct him to the Smiley Sand and Gravel Company?

A. I told him how to reach the place, yes.

Q. Had you previously been informed by anyone of this shipment?

A. I had conversation about it. I directed the shipment to be made to the Smiley job from Louisville.

Q. You mean with your Louisville office?

A. With my Evansville office.

Q. Where did you tell Mr. Darnell to go, Mr. Ball?

A. I directed him how to reach the job where Mr. Smiley was working. I have forgotten the exact directions, it is toward the TVA plant.

Q. You say you had a later conversation with him?

A. Yes.

Q. Do you know about what time that was?

A. Best I can determine, it was around seven-forty.

Q. The same evening?

A. The same evening.

Q. What was the substance of that conversation?

A. He advised me that he couldn't negotiate an underpass that he had encountered on that road, and I advised him then if he couldn't get through to unload the tractor at that point, inasmuch as it was evidently very close to the job, and we would arrange some other way to get it there. He said he didn't have any way to unload it, so I told him to bring it back to our plant and unload it in the yard.

Q. Where is that yard located?

A. It is on 45 by-pass, near North 8th Street.

Q. Was the equipment brought to your yard and unloaded?

A. I found it there the next morning.

Q. Was Mr. Darnell there?

A. No.

Q. But the equipment was.

A. The equipment was on the yard.

Q. Do you know who unloaded it?

A. No, sir.

Mr. Marshall: That's all.

Cross-examination by Mr. Mitchell.

Q. Mr. Ball, you say you were at the Cobb Hotel the first time he called you?

A. Yes, sir.

Q. And you told him how to go to get to Smiley Sand & Gravel Company?

A. That's right.

Q. You recall the exact instructions that you gave him?

A. I don't believe I could.

Q. Do you recall whether or not you told him to take Highway 385 to its junction with 305, where there was a grocery store and to turn right there?

A. No, sir, I don't remember just exactly what my directions were.

Q. You knew that this trestle or underpass existed on that route, didn't you?

A. I did not, no, sir.

Q. You have since seen it, have you not?

A. Yes, sir.

Q. How long after the collision was it before you saw it?

A. I imagine it was the next day—I believe.

Q. Did you observe any damage to it?

A. I would like to retract that last statement—I don't believe it was the next day that I saw that bridge. On second thought, I don't believe it was, because when I saw the bridge, it had been repaired.

Mr. Mitchell: That's all.

Redirect Examination by Mr. Marshall.

Q. Mr. Ball, did you examine the equipment out in the yard of the plant of Brandeis, in Paducah?

A. The next day I examined it superficially—not a thorough examination—examined it somewhat.

Q. Did it bear any marks of having been struck or having struck any object?

A. There was a place broken in back of the equipment that held the upright digging apparatus. However, that appeared to be minor at the time.

Mr. Marshall: That's all.

State of Kentucky
County of Jefferson

I, Helen M. Whedon, Official Reporter for the United States District Court for the Western District of Kentucky, hereby certify that the foregoing is a true, correct and complete transcript of the witnesses' testimony set forth herein; that such proceedings were reported by me at the time and place set forth herein in shorthand and also on an electric recording machine, and later transcribed by me on a typewriter.

I further certify that I am not related by blood or marriage to any of the interested parties hereto, and am in no way interested in the outcome of same.

Given under my hand as Reporter aforesaid, this the 8th day of February, 1952.

Helen M. Whedon,
Reporter.

Proceedings

December 17, 18 and 19, 1951,
Paducah, Kentucky.

Heard before:

Honorable Roy M. Shelbourne, United States District Judge for the Western District of Kentucky, with a jury.

APPEARANCES.

Mr. James G. Wheeler and Mr. Thomas J. Marshall, for the plaintiff;

Mr. W. L. Mitchell and Mr. W. C. Welborn of Evansville, Indiana, and Mr. Joseph Freeland, for the defendants.

At the conclusion of the introduction of the testimony for the plaintiff, the following proceedings were had:

Mr. Mitchell: All right, let it be stipulated then as a part of the evidence in this cause that the Illinois Central Railrod Company, plaintiff, is a citizen of the State of Illinois, and that the individual defendants, S. G. Oberding, doing business as Vess Transfer Company, and Charles Darnell are each and both of them citizens of the State of Indiana, and reside in the City of Evansville of said State.

Mr. Welborn: I don't believe that stipulation is correct—at the time of the filing of the action here.

By the Court: And at all times since and now.

State of Kentucky }
County of Jefferson }

I, Helen M. Wheelon, Official Reporter for the United States District Court for the Western District of Kentucky, hereby certify that the foregoing is a true, correct and complete transcript of the proceedings set out herein; that such proceedings were taken by me at the time and place set forth in the caption hereof in shorthand and also on an electrical recording machine and later transcribed by me on a typewriter.

I further certify that I am not related by blood or marriage to any of the parties hereto, and am in no way interested in the outcome of same.

Given under my hand as Reporter aforesaid, this the 21st day of January, 1952.

Helen M. Whedon,
Reporter.

TRIAL ORDER—Entered December 19, 1951.

On December 17, 1951, came the parties by counsel and announced ready for trial. Plaintiff was represented by Messrs. Wheeler and Marshall, Paducah; defendants by Messrs. W. C. Welborn and W. L. Mitchell, Evansville, Indiana, and Joseph S. Freeland, Paducah. A jury was selected, impaneled, and sworn.

Mr. Marshall stated the case for the plaintiff, Mr. Mitchell for the defendants.

Plaintiff began presentation of its evidence and continued through the day. At five o'clock court adjourned to December 18th, at 9:30.

On December 18th, plaintiff's presentation of evidence was resumed and continued through the day.

On December 19th, trial was resumed. Plaintiff offered to file an amended complaint to conform to the proof, to which objection by defendants was made. Defendants' objection was overruled and the amended answer ordered filed. Same was controverted of record.

It was stipulated by counsel that plaintiff is a citizen of Illinois and defendants at the time of the accident sued on were and are now residents of Indiana, residing at Evansville, Indiana.

Defendants' evidence was then presented and was completed at 2:25 p. m. No rebuttal was presented, and court recessed for conference on instructions until 3:20. Argu-

ment of counsel was made to the jury, the Court's instructions were given, and the jury retired at 4:50 p. m.

Objections made by the parties to the court's instructions, more particularly shown by the reporter's transcript of evidence herein, were overruled by the Court.

At approximately 7:00 p. m. the jury returned to court and read and filed with the Clerk the following verdict:

"We, the jury, find for the Plaintiff damages in the sum of $37,500.00." J. D. Rains, Foreman.

Roy M. Shelbourne,
Judge, U. S. District Court.

JUDGMENT—Entered December 19, 1951.

The jury herein having returned a verdict for the plaintiff, Illinois Central Railroad Company, Inc., against the defendants S. G. Olberding doing business as Vess Transfer Company and Charles Darnell,

It Is Ordered, Adjudged, and Decreed that the plaintiff, Illinois Central Railroad Company, Inc., have and recover of the defendants S. G. Olberding doing business as Vess Transfer Company and Charles Darnell, the sum of Thirty-Seven Thousand Five Hundred ($37,500.00) Dollars with interest thereon at the rate of 6% per annum from date hereof until paid, and its costs herein, for all of which execution may issue.

Roy M. Shelbourne,
Judge, U. S. District Court.

NOTICE OF APPEAL—Filed January 16, 1962.

Notice is hereby given that the above named defendants, S. G. Olberding and Charles Darnell, hereby appeal to the United States Court of Appeals for the Fifth Circuit, from the final judgment entered in this action on the 19th day of December, 1961.

W. [illegible]
[illegible]
[illegible]
[illegible]

W. C. [illegible]
[illegible]
[illegible]
[illegible]

Milford M. Miller,
916 Court Bldg.,
Evansville, Indiana,

Joseph S. Prichard,
Paducah, Kentucky.

A copy of defendants' Notice of Appeal was served on plaintiff's attorney by the Clerk of the Court by mailing same on January 16, 1962.

Certified: W. T. Beckham, Clerk,
By Georgia Mae Nelson, Deputy Clerk.

COST BOND—Filed January 16, 1962.

Know All Men By These Presents, that we, S. G. Olberding and Charles Darnell, as principals and the Travelers Indemnity Company, as surety, are held and firmly bound unto the Illinois Central Railroad Company, Inc., in the full and just sum of Two Hundred Fifty ($250.00) Dollars, to be paid to the said appellees, their successors, representatives or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Cont Bond

Dated With Our Bank, and dated this 11th day of Jan-
uary, 1909.

Whereas, lately at the October Term of the United States Circuit Court of Kentucky, in a suit pending in said Court between Illinois Central Railroad Company, Inc., and C. W. Stoutsberry and Charles Darnell, a judgment was rendered against the defendants and the said defendants have duly filed notice of an appeal to the United States Court of Appeals for the Sixth Circuit.

Now, the condition of the above obligation is such that if the said C. W. Stoutsberry and Charles Darnell shall prosecute said appeal with effect and pay all costs, if the appeal is dismissed or the judgment affirmed or such costs as the Court may award if the judgment is modified, then the above obligation to be void, otherwise to remain in full force and virtue.

C. C. Stoutsberry (Seal)
Charles Darnell (Seal)
Principals.
Travelers Indemnity Co.,
By C. W. Stoutsberry (Seal)
Surety.
(Treasurer Seal)

THE TRAVELERS INDEMNITY COMPANY
Hartford, Connecticut

POWER OF ATTORNEY

Know All Men By These Presents:

That The Travelers Indemnity Company, a corporation of the State of Connecticut, does hereby make, constitute and appoint J. L. Alderson, C. W. Stoutsberry, W. H. Curry, R. L. Myre, Jr., Jesse M. Robins, R. Sullivan, all of Louisville, Kentucky, Each, its true and lawful Attorney(s)-in-Fact, with full power and authority, for and on behalf of the Company as surety, to execute and deliver and affix the seal of the Company thereto; if a seal is required, bonds, under-

Case Deed

bonds, undertakings, recognizances or other written obligations in the nature thereof, as follows:

Any and all bonds, undertakings, recognizances or other written obligations in the nature thereof not exceeding in amount Fifty Thousand Dollars ($50,000) in any single instance.

and to bind The Travelers Indemnity Company thereby, and all of the acts of said Attorney(s)-in-Fact, pursuant to these presents, are hereby ratified and confirmed.

This appointment is made under and by authority of the following By-laws of the Company which By-laws are now in full force and effect:

Article IV, Section 8. The Chairman of the Board, the President, any Vice President, and Secretary or any Department Secretary may appoint attorneys-in-fact or agents with power and authority, as defined or limited in their respective powers of attorney, for and on behalf of the Company to execute and deliver, and affix the seal of the Company thereto, bonds, undertakings, recognizances or other written obligations in the nature thereof and any of said officers may remove any such attorney-in-fact or agent and revoke the power and authority given to him.

Article IV, Section 11. Any bond, undertaking, recognizance or written obligation in the nature thereof shall be valid and binding upon the Company when signed by the Chairman of the Board, the President or any Vice President and duly attested and sealed, if a seal is required, by any Secretary or any Department Secretary or any Assistant Secretary, or when signed by the Chairman of the Board, the President or any Vice President and countersigned and sealed, if a seal is required, by a duly authorized attorney-in-fact or agent; and any such bond, undertaking, recognizance or written obligation in the nature thereof shall be valid and binding upon the Company when duly executed and sealed, if a seal is required, by one or more attorneys-in-fact or agents pursuant to and within the

[illegible]

Cost Bond

Notice of the authority granted by his or their power or powers of attorney.

In Witness Whereof, The Travelers Indemnity Company has caused these presents to be signed by its proper officer and its corporate seal to be hereunto affixed this 7th day of December, 1950.

The Travelers Indemnity Company,
By J. C. Smith,
(Seal) Secretary.

State of Connecticut, County of Hartford—ss:

On this 7th day of December, in the year 1950, before me personally came J. C. Smith, to me known, who, being by me duly sworn, did depose and say; that he resides in the State of Connecticut; that he is Secretary of The Travelers Indemnity Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority of his office under the by-laws of said corporation, and that he signed his name thereto by like authority.

Grace G. Holland,
(Seal) Notary Public.
My commission expires April 1, 1954.

State of Connecticut, County of Hartford—ss:

I, R. W. Kamtsann, Assistant Secretary of The Travelers Indemnity Company, a corporation of the State of Connecticut, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney, executed by said Company, which is still in full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Company, at the City of Hartford, this 10th day of January, 1952.

R. W. Kamtsann,
Assistant Secretary.

NOTICE TO PLAINTIFF, ILLINOIS CENTRAL RAILROAD CO., ETC.

To the Honorable William T. Ingliss, Clerk of the United States District Court for the Western District of Kentucky:

You are hereby notified that the defendants, S. G. Olberding d/b/a Vess Transfer Co. and Charles Darnell, will on the 30th day of January, 1952, in the above cause, file with the Clerk of the United States District Court for the Western District of Kentucky, Paducah Division at Paducah, Kentucky, defendants' "Designation of Contents of Record on Appeal" and "Defendant-Appellants' Statement of Points" pursuant to Rule 75 of the Federal Rules of Civil Procedure.

A copy of said designation and statement of points is attached hereto.

Dated at Evansville, Indiana, this 24th day of January, 1952.

W. L. Mitchell,
W. C. Welborn,
Milford M. Miller,
Joseph S. Freeland,
Attorneys for Defendants.

PROOF OF SERVICE—Filed January 25, 1952.

Milford M. Miller, being first duly sworn upon his oath says that he is one of the attorneys of record representing the defendants, S. G. Olberding d/b/a Vess Transfer Co. and Charles Darnell. That on the 24th day of January, 1952, he deposited in the United States mail at the United States Post Office at Evansville, Indiana, an envelope with sufficient postage, addressed to Wheeler & Marshall, attorneys for the plaintiff, Paducah, Kentucky, the attached notice together with defendants' "Designation of Contents of

Proof of Service

Record on Appeal" and also "Defendant-Appellants' Statement of Points."

Further affiant sayeth not.

Milford M. Miller,

State of Indiana
Vanderburgh County } ss:

Subscribed and sworn to before me, a Notary Public in and for said County and State this 24th day of January, 1952.

My commission expires March 3, 1952.

Nadine Brady,
Notary Public.

(Seal)

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed January 25, 1952.

To the Honorable William T. Beckham, Clerk of the United States District Court for the Western District of Kentucky:

You are hereby requested to make a transcript of the record to be filed in the United States Court of Appeals for the Sixth Circuit, pursuant to Notice of Appeal in the above entitled cause and to include in such transcript of the record the following:

1. Plaintiff's Complaint and entry showing filing thereof.

2. Marshall's Return of Service on the Secretary of State for defendants Olberding and Darnell and entries showing filing thereof.

3. Return of Secretary of State showing mailing of process to Olberding and Darnell and filing thereof and entry showing filing thereof.

Designation of Contents of Record, Etc.

4. Motion of defendants S. G. Olberding and Charles Darnell to quash process and dismiss the action with supporting affidavit and entry showing the filing thereof.

5. Special appearance of Welborn and Miller for defendants Olberding and Darnell.

6. Plaintiff's Motion to Dismiss the Action as to defendant Brandeis Machinery and Supply Co., Inc. and entry showing the filing thereof.

7. Order sustaining the Motion to Dismiss the Action as to Brandeis Machinery and Supply Co., Inc. and dismissing the action as to said defendant.

8. Order overruling Motion of defendants S. G. Olberding and Charles Darnell to quash the process and dismiss the action as to said defendants.

9. Answer of defendants S. G. Olberding and Charles Darnell and entry showing the filing thereof.

10. Plaintiff's Motion to strike paragraphs two to eleven from first defense of Defendants' Answer and filing thereof.

11. Defendants' Motion for Leave to file Fourth Defense and defendants' Fourth Defense therewith.

12. Plaintiff's Objections to filing of defendants' Fourth Defense.

13. Defendant Charles Darnell's Motion to dismiss the action for non-joinder of indispensible party and for want of jurisdiction and entries showing filing thereof.

14. Order overruling plaintiff's objections to the filing of Fourth Defense and entry showing filing thereof.

15. Order of court sustaining plaintiff's Motion to Strike Paragraphs Two to Eleven from defendants' First Defense of Answer.

16. Order of court overruling Charles Darnell's Motion to Dismiss the Action.

17. Order setting case for trial.

18. Trial orders.

19. Filing of plaintiff's Amended Complaint to conform to the evidence and plaintiff's Amended Complaint.

20. Verdict of the jury.

21. Judgment of the Court.

Designation of Contents of Record, Etc.

22. Stipulation of the parties on the trial as to the citizenship of parties, plaintiff and defendants, as certified by the Reporter from the transcript of the evidence in the cause.

23. Notice of Appeal and date of filing Proof of Service thereof.

24. Appeal Bond.

25. This transcript of the contents of the record with Proof of Service.

26. Statement of Points relied upon by plaintiff.

27. Clerk's certificate authenticating the parts of the record designated herein.

Said transcript to be prepared as required by law and the rules of this court and of the United States Court of Appeals for the Sixth Circuit and to be transmitted to and filed in the office of the Clerk of the United States Court of Appeals for the Sixth Circuit on or before the 25th day of February, 1952.

Dated this 24th day of January, 1952.

W. L. Mitchell,
517 Citizens Bank Bldg.,
Evansville, Indiana,
W. C. Welborn,
Milford M. Miller,
502 Court Bldg.,
Evansville, Indiana,
Joseph S. Freeland,
Citizens Bank Bldg.,
Paducah, Kentucky,
Attorneys for Defendants.

DEFENDANT-APPELLANTS' STATEMENT OF POINTS—Filed January 25, 1952.

To the Honorable William T. Beckham, Clerk of the United States District Court for the Western District of Kentucky:

The defendants, S. G. Olberding and Charles Darnell, and each of them now serve with their "Designation of Contents of Record on Appeal" herein, the following concise statement of the points on which they and each of them intend to rely for a reversal thereof:

1. The court erred in overruling the Motion of the defendants, S. G. Olberding and Charles Darnell, to quash the process and dismiss the action with supporting affdavit.

2. The court erred in sustaining plaintiff's Motion to Dismiss the Action as to defendant Brandeis Machinery & Supply Co.

3. The court erred in sustaining plaintiff's Motion to Strike Paragraphs 2 to 11 from defendants' First Defense of the Answer herein.

4. The court erred in overruling defendant Charles Darnell's Motion to Dismiss the Action for Nonjoinder of Indispensible Party and for want of jurisdiction of the particular action herein.

5. The venue of the action was wrongfully laid as to the defendants, S. G. Olberding and Charles Darnell, because each is and was at the time of the filing of the action herein a citizen and resident of Indiana.

6. There is want of jurisdiction in the United States District Court for the Western District of Kentucky because the action is solely for personal judgment and neither plaintiff nor defendant nor any of them are citizens of Kentucky or reside in the Western District of Kentucky.

W. L. Mitchell,
W. C. Welborn,
Milford M. Miller,
Joseph S. Freeland.

COUNTER-DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS, AND EVIDENCE—Filed February 1, 1952.

To the Honorable W. T. Beckham, Clerk of the United States District Court, for the Western District of Kentucky:

For its counter-designation of additional portions of the record, proceedings, and evidence to be included in the record on appeal, the plaintiff, appellee, requests the inclusion of the following:

1. The deposition of the defendant, Charles Darnell, taken by the plaintiff, and read in evidence on plaintiff's behalf.

2. Transcript of the evidence of the witnesses:

S. W. Peters
Allen Ball
Loyce Thompson

This 1st day of February, 1952.

James G. Wheeler,
Thos. J. Marshall, Jr.,
Attorneys for Plaintiff.

PROOF OF SERVICE.

I certify that I have this day served copy of the above counter-designation of additional portions of the record, as follows:

1. On Joseph S. Freeland, Attorney for Defendants, by delivering copy to him.

2. On W. L. Mitchell, 517 Citizens Bank Building, Evansville, Indiana, Attorney for Defendants; W. C. Welborn, and Milford M. Miller, 502 Court Building, Evansville, Indiana by mailing copies to them at the addresses given above. This 1st day of February, 1952.

James G. Wheeler,
c/o Wheeler & Marshall,
901 Citizens Savings Bank Bldg.,
Paducah, Kentucky,
Attorneys for Plaintiff.

CLERK'S CERTIFICATE.

I, W. T. Beckham, Clerk, United States District Court for the Western District of Kentucky, certify that the foregoing is a true and correct copy of the record of proceedings had in this Court as called for by the Designation of Record filed January 25, 1952, and Counter-Designation filed February 1, 1952.

W. T. Beckham,
Clerk, United States District Court.

(Seal)

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

CAUSE ARGUED AND SUBMITTED.

(February 2, 1953—Before: Allen, Martin and McAllister, *JJ.*)

This cause is argued by W. C. Welborn and William L. Mitchell for appellant and by James G. Wheeler for appellee and is submitted to the court.

JUDGMENT.

(Filed: February 12, 1953.)

Appeal from the District Court of the United States for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Opinion

OPINION.

(Filed: February 12, 1953.)

No. 11587

UNITED STATES COURT OF APPEALS

For the Sixth Circuit.

S. G. Osborne, d.b.a. Vess Transfer Company, and Charles Darnell,

Appellants,

v.

Illinois Central Railroad Company,

Appellee.

} Appeal from the United States District Court for the Western District of Kentucky.

Decided February 12, 1953.

Before Allen, Martin and McAllister, Circuit Judges.

Martin, Circuit Judge. In the district court, a judgment was entered for plaintiff [now appellee] on the verdict of a jury awarding $37,500 damages for the negligent operation of a large motor vehicle which was transporting a piece of heavy machinery on a highway in McCracken County, Kentucky. The sole issue on appeal is a challenge to the venue of the United States District Court and the validity of the service of process on appellants.

Jurisdiction in the district court was grounded on the diversity of citizenship of the parties, the plaintiff railroad company having been incorporated under the laws of Illinois and appellants being residents of the State of Indiana. Service of process was rested upon Kentucky Revised Statutes 188.020 and 188.030, wherein it is provided: "Any nonresident operator or owner of any motor vehicle who accepts the privilege extended by the laws of this state to nonresidents to operate motor vehicles or have them operated within this state shall, by such acceptance and by the operation of such motor vehicle with-

in this state, make the Secretary of State his agent for the service of process in any civil action instituted in the courts of this state against the operator or owner arising out of or by reason of any accident or collision or damage occurring within this state in which the motor vehicle is involved."

Upon the authority of the hereinafter cited cases, we think the action fell plainly within the venue of the United States District Court and that the service of process under the foregoing Kentucky statutes was valid.

In *Nierbo Co.* v. *Bethlehem Corporation*, 308 U. S. 165, 170, 174, the Supreme Court held that a foreign corporation which, in conformity with a valid state statute as a condition upon which it was privileged to do business within the state, designated an agent upon whom service of process could be made had given effective consent to being sued in the federal courts of that state. Compare *Ex Parte Schollenberger*, 96 U. S. 369. See also *Hess* v. *Pawloski*, 274 U. S. 352, wherein it was held that a Massachusetts statute was valid where it declared that the use of the state's highways by a nonresident motorist shall be deemed equivalent to an appointment by him of the registrar as his attorney upon whom process may be served in any action growing out of any accident or collision in which the nonresident may be involved while operating a motor vehicle on the state's highways. *Cf. Mississippi Publishing Corporation* v. *Murphree*, 326 U. S. 438.

A comprehensive opinion with which we are in accord is *Knott Corporation* v. *Parsons*, 163 F. (2d) 199, 204 (C. A. 4). In that case, Judge Parker states: "It is well settled that appointment of an agent upon whom service of process can be made within a state waives the provision of the federal venue statute, so that a defendant may be sued in the state in the federal court as well as in the state court, if the case is within the federal jurisdiction. [Citing the *Nierbo* and *Schollenberger* cases.] . . . Applying to the case at bar the 'common sense' which Chief Justice Waite is said by the Supreme Court to have applied in the *Schollenberger* case, we think it clear that with respect to waiving the provisions of the federal

venue statute there can be no distinction between the consent to suit and service of process implied from doing business in the state and that arising out of appointment of a process agent, so that where a foreign corporation has given such consent as subjects it to suit in the courts of the state, the same consent subjects it to suit in the federal courts there sitting if the elements of federal jurisdiction are present. Or to put the matter conversely, the consent implied from doing business in the state not only authorizes suit in the courts of the state, with service of process upon a designated state officer, but also waives the provisions of the federal venue statute so that suit can be brought in the federal court, if the elements of federal jurisdiction are present."

A well reasoned district court opinion, written by Judge Vaught, is directly in point in sustaining venue and service in this case. *Burnett* v. *Swenson*, 95 F. Supp. 524 (W. D. Okla.). See also *Kostamo* v. *Brorby*, 96 F. Supp. 806 (D. C. Neb.); *Morris* v. *Sun Oil Company*, 83 F. Supp. 529 (D. C. Md.), opinion by Judge Chesnut; *Urso* v. *Scales*, 90 F. Supp. 653 (D. C. Pa.). We are not in accord with the opinion in *Martin* v. *Fischbach Trucking Co.*, 183 F. (2d) 53 (C. A. 1).

The judgment of the district court is affirmed.

MOTION BY PLAINTIFFS-APPELLANTS FOR STAY OF MANDATE.

(Filed February 16, 1953.)

Come now the plaintiffs-appellants, S. G. Olberding and Charles Darnell, and respectfully move the court for a stay of mandate in the above entitled cause, decided February 12, 1953, for the purpose of giving said plaintiffs-appellants time to prepare and file a petition for writ of certiorari in the Supreme Court of the United States.

Plaintiffs-Appellants respectfully represent to the court that in their opinion the decision and judgment of the court so made and entered on the 12th day of February, 1953, is erroneous and in conflict with the decision of the United States Court of Appeals for the First Circuit in the case of *Martin vs. Fischbach Trucking Co.* (1950), 183 F. (2d) 53, on the same matter and decides an important question of local law probably in conflict with the applicable local decisions of the Court of Last Resort in the State of Kentucky on the same matter and decides an important question of Federal law which has not been, but should be, settled by the Supreme Court of the United States, namely the question of involuntary waiver of the venue provisions of Section 1391(a) of the Judicial Code by the operation by a nonresident of a motor vehicle in the State of Kentucky and has decided this Federal question in a way probably in conflict with applicable decisions of the Supreme Court of the United States.

Plaintiffs-Appellants further represent to the court that they will proceed with due diligence and prompt dispatch and will cause to be prepared a sufficient transcript of the proceedings had in the above entitled cause necessary for use in connection with their said petition for certiorari, and will cause the same to be properly filed in the office of the Clerk of the Supreme Court of the United States within the time fixed and allowed by the Rules of said court, or within such extension of time as may be granted by said court or some Justice thereof.

WHEREFORE, plaintiffs-appellants move the court for an order staying the issuance of the mandate on the judgment thus rendered by this court on the 12th day of February, 1953, for a period of thirty days pending the ap-

plication for certiorari to the Supreme Court of the United States, as aforesaid, and for such further relief in the premises as may be considered appropriate by the court.

Dated this 17th day of February, 1953.

Respectfully submitted:

S. G. Olberding,
Charles Darnell,
By W. L. Mitchell,
W. C. Weldon,
Milwood M. Miller.

PRAECIPE FOR TRANSCRIPT FOR USE IN APPLICATION FOR WRIT OF CERTIORARI.

(Filed February 18, 1953.)

To the Clerk of the United States Court of Appeals for the Sixth Circuit at Cincinnati:

You will please prepare for S. G. Olberding and Charles Darnell, Petitioners-Appellants, a complete transcript of the record in the above entitled cause for use in connection with their Petition for Writ of Certiorari in the Supreme Court of the United States, and include therein the following:

1. Certified Transcript of the Record of the proceedings had in the United States District Court for the Western District of Kentucky, Paducah Division, printed copy of which was filed in your office on the 24th day of April, 1952.

2. The proceedings had in the United States Court of Appeals for the Sixth Circuit in said action including the opinion of the Court of Appeals of February 12, 1953, and the judgment of the Court of Appeals of February 12, 1953.

3. Reference to the filing of petitioners' written Motion to Stay the Mandate of the United States Court of Appeals for the Sixth Circuit and Order entered thereon and date thereof.

4. Copy of the Praecipe.

5. Proper Clerk's Certificate.

Dated this 17th day of February, 1953.

S. G. Glenbrook,
Charles Darnell,
Plaintiffs-Appellants,

By W. L. Mitchell,
W. C. Wheeler,
Milford M. Miller,
Attorneys for Plaintiffs-Appellants.

PROOF OF SERVICE OF PRAECIPE FOR TRANSCRIPT FOR USE IN APPLICATION FOR WRIT OF CERTIORARI ON RESPONDENT-APPELLEE.

(Filed February 18, 1953.)

Milford M. Miller, being first duly sworn upon his oath says, that he is one of the attorneys for record representing the Petitioners-Appellants. That on the 17th day of February, 1953, he deposited in the United States mail, at the Post Office at Evansville, Indiana, in envelope with sufficient postage, addressed to the following attorneys for the Respondent-Appellee, a copy of praecipe for transcript for use in application for writ of certiorari, as hereto attached: Wheeler & Marshall, 901-5 Citizens Bank Building, Paducah, Kentucky.

Further affiant sayeth not.

Milford M. Miller.

State of Indiana,
Vanderburgh County, ss.

Subscribed and sworn to before me, a Notary Public in and for said county and state, this 17th day of February, 1953.

Benjamin E. Burnte,
Notary Public.

Commission expires: August 21, 1955.

(Seal)

ORDER STAYING MANDATE.

(Filed February 26, 1953.)

Ordered, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

APPROVED FOR ENTRY:

JOHN D. MARTIN,
U. S. Circuit Judge.

Certificate of Clerk

UNITED STATES COURT OF APPEALS

For the Sixth Circuit.

I, Carl W. Reuss, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of S. G. Olberding, etc., et al. vs. Illinois Central Railroad Co., Inc., No. 11,587, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 26th day of February, A. D. 1953.

Carl W. Reuss, *Clerk*,
Noyce Robertson,
Chief Deputy Clerk of the United States Court of Appeals for the Sixth Circuit.

(Seal)

Supreme Court of the United States, October Term, 1953

No. 683

S. G. Olberding, Doing Business as Vess Transfer Company and Charles Darnell, Petitioners,

vs.

Illinois Central Railroad Company, Inc.

Order Allowing Certiorari—Filed May 4, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.